SUPREME COURT OF THE UNITED STATES.

No. 1070.

RICHARD E. WHITSITT AND JAMES MESKEW, APPELLANTS,

vs.

THE UNION DEPOT AND RAILROAD COMPANY, THE DENVER, SOUTH PARK AND PACIFIC RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 5th day of May, A. D. 1880, came E. T. Wells, esq., an attorney of said court, and filed in said court a bill complaint, wherein Richard E. Whitsitt and James Meskew were complainants, and The Union Depot and Railroad Company et al. were defendants, and sued out of said court a subpœna thereon.

And the said bill of complaint is in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA,
District of Colorado:

In the circuit court of the United States within and for said district, sitting at Denver.

Richard E. Whitsitt and James Meskew, who are citizens of the State of Colorado, bring this bill against The Union Depot and Railroad Company, a corporation under the laws of the State of Colorado, Taylor, Tobey, and James H. Place, servants of the said company, George W. Clayton, David C. Dodge, The Denver, South Park and Pacific Railroad Company, also a corporation under the laws of the State of Colorado, Walter S. Cheesman, John W. Smith.

And thereupon the plaintiffs complain and say that heretofore and about the year 1858 divers persons, citizens of the United States, including the plaintiff, Richard E. Whitsitt, among others, associated themselves together by the name of the Denver City Town Company,
3 otherwise called the Denver Town Company, for the purpose of founding and establishing a town or city in the public domain of the United States, and settling upon those certain public lands, then part of the unsurveyed public domain of the United States, and since designated according to the public surveys as section 33, and the west half of section 34, in township 3 south, of range 68 west, of the 6th principal meridian, and afterwards and about the same time surveyed and subdivided the same into city lots and blocks, streets and alleys, and occupied the same as a town site, by them called the city of Denver or Denver City, and erected upon each forty acres of each quarter section of said premises divers houses and other improvements, and caused public roads to be surveyed and opened, and bridges to be built thereon to facilitate access from the inhabited portions of the United States to the said town or city, and erected, or procured to be erected, at and within the said town, divers hotels, corrals, public stables, and other like buildings for the accommodation of citizens of the United States
4 and others who might journey to the said town.

That afterwards, and about the 11th day of May, A. D. 1859, the said Denver Town Company set off, allotted, and donated to a certain association, corporation or partnership known as the Leavenworth City and Pike's Peak Express Company certain lots in the said town site, and among others those certain lots known and described in the survey of the said town site hereinbefore mentioned, and now known and described as lots 15 and 16 in block 14, in the east division of the city of Denver, and at about the same time admitted the said Leavenworth City and Pike's Peak Express Company to possession of some of said lots, and the said Leavenworth City and Pike's Peak Express Com-

pany thereupon, and about that same time entered into the possession and occupancy of some of the said lots, among others lot in block in the said town site, and erected thereon lasting and valuable improvements, and thereat and thereon carried on their business of a
5 common carrier of freight and passengers. And on or about the 11th day of May, A. D. 1859, the said Denver Town Company, by their certain deed or agreement in writing, afterwards, and about the first day of February, A. D. 1860, recorded in the office the recorder of said county of Arapahoe, and now of record in the office of the recorder of said county of Arapahoe, donated and conveyed the said lots and parcels of land to the said Leavenworth City and Pike's Peak Express Company; that afterwards, and on or about the 14th day of April, A. D. 1860, the said Leavenworth City & Pike's Peak Express Company, by their certain deed of release in like manner recorded in the said office, and now of record in the office of the recorder of Arapahoe County released, transferred and conveyed unto the Central Overland Cali-, fornia and Pike's Peak Express Company, a corporation by that name, the lots 15 and 16 in block 14 aforesaid, and by divers other con-
6 veyances in like manner recorded in the office of the recorder of said county of Arapahoe the said premises, and all the estate, right, title, and interest of the said Denver City Town Company and the said Central Overland California & Pike's Peak Express Company or each of them or either of them at any time had in said premises was, and now is, invested in the plaintiff, Richard E. Whitsitt.

Plaintiffs further show that until the assumption of the possession thereof by the plaintiffs as hereinafter mentioned the said premises and every part thereof were entirely vacant and unoccupied.

That by the certain act of Congress entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado," approved on the 28th day of May, A. D. 1864, the Congress of the United States enacted among other things that the provisions of the act of Congress for the relief of the citizens of towns on the lands of the United States
7 under certain circumstances, approved May 3d, 1844, should be so extended as to authorize the probate judge of Arapahoe County to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said lands, and the bona fide owners of the improvements thereon according to their respective interests, the said section 33, and the west half of section 34 aforesaid, or such portions thereof as were settled and actually occupied for town purposes by the town of Denver aforesaid, and that in all respects, except as therein modified, the execution of the provisions of the said act should be controlled by the provisions of the act of May 23d, 1844, and the rules and regulations of the Commissioner of *of* the General Land Office. That in pursuance of said act of Congress, James Hall, esq., then probate judge of the said county of Arapahoe, did, on the 6th day of May, A. D. 1865, enter, at the land office of the United States in Denver aforesaid, the before-described lands, and afterwards, and on or about the first
8 day of July, A. D. 1868, the same were by letters patent granted to the said James Hall in his official capacity aforesaid; that the said James Hall having conveyed away certain lots in the said town site to the occupants and owners of the improvements thereon, on or about the 16th day of March, A. D. 1867, his term of office as such probate judge having theretofore expired, released and conveyed to Omer O. Kent, esq., his successor in said office, all the residue of the lots and lands in said town site not by him theretofore conveyed as aforesaid, and afterwards and on or about the 31st day of August, 1867, the said

Omer O. Kent, his term of office having expired, released and conveyed to Jacob Downing, esq., his successor in the said office, all the residue of the lots and premises in the said town site not by him or the said James Hall conveyed as aforesaid.

That on or about the 23d day of September, A. D. 1869, the
9 said Jacob Downing, his term of office as said probate judge having expired, conveyed and released unto Henry A. Clough, esq., his successor in the said office, all the lots and premises in the said town site not by him, the said Jacob Downing, and his predecessors in the said office conveyed as aforesaid, and on or about the 22d day of September, A. D. 1873, the said Henry A. Clough, his term of office as such probate judge having expired, released and conveyed to William C. Kingsley, esquire, then probate judge and successor to the said Henry A. Clough, all the lots and premises in the said town site not by him, the said Henry A. Clough and his predecessors, in the said office conveyed as aforesaid; and on or about the 23d day of September, A. D. 1875, the said William C. Kingsley, his term of office having then expired, released and conveyed unto Amos Stick, esquire, his successor in the said office, all the lots and premises in the said town site not by him or the said William C. Kingsley and his predecessors in the
10 said office conveyed as aforesaid.

Plaintiffs further show that immediately after the entry of the said lands as hereinbefore set forth, the said James Hall, probate judge as aforesaid, gave public notice of such entry by posting such notice in three public places within the said town of Denver, and by publishing the same in a newspaper printed and published in the county of Arapahoe, wherein the said town or city of Denver was then situated, and that on or about the seventeenth of July, A. D. 1865, and within ninety days after the first publication of the said notice, one Ben Holliday, who the said plaintiffs show was then and there entitled to the said premises and by divers intermediate conveyances had acquired the legal estate therein and thereto from the said Leavenworth & Pike's Peak Express Company, signed a statement in writing containing an accurate description of the said before described lots and other lots, stating and setting forth the specific right, interest, and estate, to wit, an estate in fee which he, the said Ben Holliday, claimed to be entitled to receive and delivered such statement to and into the office of the said probate judge.

11 Plaintiffs further show that afterwards, and about the sixth day of March, A. D. 1868, one Edward Chase, falsely claiming and pretending that one Hamilton R. Hunt and Charles A. Cook, both since deceased, were at the date of the entry of said lands by the said probate judge the occupants or the bona fide owners of the improvements upon the said lots, and claiming that the said Hunt and Cook had in like manner within ninety days after the first publication of the notice aforesaid by the said probate judge delivered to the said probate judge a statement in writing of their claim to the said premises, describing the same, applied to the said Jacob Downing, and although, as plaintiffs are informed and believe, neither the said Ben Holliday nor the said Hunt and Cook nor either of them nor any person claiming under them or either of them had instituted any action at law or in chancery to determine their conflicting claims in and to the said premises, and although no such determination theretofore in any court been had, the said Jacob Downing on such request of the said Edward Chase, without summoning the said Ben Holliday or any person or persons claiming under or representing the said Ben Holliday to make his

or their proofs and allegations in reference to the claim of the
12 said Ben Holliday to the said lots adverse to the said Hunt and Cook, on or about that same sixth day of March, A. D. 1868, wrongfully and in violation of his duty in that behalf executed his deed conveying the said premises to the said Edward Chase.

Plaintiffs further show that afterwards, and about the second day of January, A. D. 1869, the said Ben Holliday, by his deed of that date, conveyed the said premises to the plaintiff, Richard E. Whitsitt, and to one John Hughes; and afterwards, and on or about the 23d day of October, A. D. 1861, the said John Hughes in like manner conveyed the said premises to the plaintiff, Richard E. Whitsitt; that afterwards, and on or about the 17th day of April, A. D. 1878, the said Amos Steck, then still probate judge of the said county of Arapahoe, duly qualified and acting as such, by his certain deed of conveyance, made in pursuance of the act of the general assembly of the State of Colorado, in such case made and provided, after reciting among other things that it had been made to appear to him, the said county judge, that the plaintiff, Richard E. Whitsitt, was the rightful owner of the said lots 15 and 16 in block 14 in the east division of the city of Denver, by a regular
13 chain of title from the Denver Town Company, in consideration of the premises in that said deed recited, and for a further consideration therein mentioned, granted and conveyed unto the said plaintiff the said lots 15 and 16 in block 14 aforesaid in fee; and that on or about the 22d day of April last past the plaintiff, Richard E. Whitsitt, leased and demised the said premises to the plaintiff, James Meskew, for the term of one year thence next following, and delivered possession of the said premises to the said James Meskew. And thereupon afterwards, and about that time, the said plaintiff, James Meskew, entered in and upon the said premises, and erected thereon a certain dwelling-house or tenement of the value of one thousand dollars or thereabouts.

Plaintiffs further show that the defendant the Union Depot and Railroad Company, which the plaintiffs show is a corporation organized and existing under the laws of the State of Colorado, claiming to be invested by divers conveyances (with the particulars whereof the plaintiffs are unacquainted) with the pretended estate, right, and title so by the said Jacob Downing conveyed to the said Edward Chase, and the de-
14 fendants, Taylor, Tobey, and James H. Place, the Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, and John W. Smith, combining and confederating with each other and with divers others to the plaintiffs unknown, but whom plaintiffs show are the servants of the said corporations or one of them, and ready and willing to perform and carry out their unlawful purposes, have at divers times since the erection of said house threatened and still threaten to tear down and destroy the said house and oust the plaintiff, James Meskew, from the possession of the said premises; that the said companies or one of them have lately commenced to lay and construct in the neighborhood of the said house a railway track, which, if continued, as the servants of the said companies or one of them engaged in the construction thereof have declared is their purpose to do, the same will pass through one corner of the said house, and plaintiffs fear and believe that unless restrained by the writ of injunction, the said defendants before named, or their servants and employés acting at their instance in the premises, will speedily cause the said track to be built through the said house, and will destroy and tear down the said house; and the said companies are now, under the direction

15 of the said Tobey and the said Walter S. Cheesman, with a large force of men and railway cars, engaged in depositing upon the said premises large quantities of rock and stone with the view and intention, as the plaintiffs believe, of rendering the said premises unfit habitable by the said James Meskew, and so as to prevent access by the said James Meskew to his house aforesaid.

Plaintiffs further aver that at the date of the conveyance of the said Jacob Downing, as probate judge as aforesaid, to the said Edward Chase, the said Edward Chase was not, nor at any time theretofore was he, nor any other person, possessed of the said lots or any part thereof, nor was the said Edward Chase, nor any person under or from whom the said Edward Chase derived or pretended to derive title, ever at any time in any manner the occupant of the said lots or either thereof, nor the owner of any improvements whatsoever thereon, nor was he or any person under or from whom the said Chase derived title to the said lots or either thereof ever in like manner entitled thereto.

And the plaintiffs show, on information and belief, that the said defendants claim that by virtue of the act of Congress aforesaid

16 and the acts of the Territorial legislature of the State of Colorado in that behalf, the deed of the said Jacob Downing to the said Edward Chase is conclusive evidence of title in the said Union Depot and Railroad Company, and that at the date of the entry of said lands the said Edward Chase or those under whom he derived title was the rightful occupant of the said lots, or the bona fide owner of the improvements thereon, and that inasmuch as neither the said Richard E. Whitsitt, nor the said Ben. Holliday, nor any of those under whom the said Richard E. Whitsitt derives title to the said lots was at the date of said entry in possession or actual occupancy of the said lots, or the owner of any improvements thereon, the said plaintiffs cannot be admitted to impeach the conveyance of the said Jacob Downing, as probate judge as aforesaid, to the said Edward Chase, or be heard to deny that the said Edward Chase was lawfully entitled to receive the same; whereas plaintiffs are advised by counsel and aver and will claim at the final hearing hereof that under and by virtue of the act of Congress hereinbefore mentioned, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado, approved May 28th, A. D. 1864," plaintiffs, by reason of the premises hereinbefore set forth

17 and by reason of such first actual occupancy of the said premises, are lawfully entitled thereto, and that the conveyance by the said Jacob Downing assumed to be made by the said Edward Chase prior to any occupancy whatsoever of the said premises or the erection of any improvements thereon was, by reason that the said lots were then and always theretofore entirely vacant, unoccupied, and unimproved, and now is entirely void as against the plaintiffs, and that the said Union Depot and Railroad Company as to any estate derived fro the said Edward Chase in and to the said lots hold the same as trustee for the said Richard E. Whitsitt.

And plaintiffs are advised by counsel, and therefore claim and contend that according to the true intent and meaning of the said act of Congress, approved May 28th, A. D. 1864, the entry of said land by the said James Hall was in trust for the several use and benefit of the then occupants of the said land, and the bona fide owners of the improvements thereon according to their respective interests and to the extent of their several and respective occupancy of and improvements upon the several lots in the said town site, and no farther, but also in

18 trust for those who might afterwards at any time become the

first rightful occupants of any of the lots in said town-site at that time unoccupied or the bona fide owners of the improvements on such lots according to their respective interests; all which claim and contention the plaintiffs show, on information and belief, is and will be denied by the said defendants.

And plaintiffs further show, on information and belief, that the said defendants will claim and contend that at some time long since the entry of said town-site they or some of them, or some of those under and from whom they derive title, erected upon and around the said lots a certain fence, and that by reason thereof those erecting such fence became and were the first occupants of the said lots and the bona fide owners of the improvemnts thereon within the meaning of the act of Congress aforesaid, approved May 28th, 1864; whereas, the plaintiffs do and will claim and contend that the said lots were not, nor was either thereof at any time prior to the entry therein of these plaintiffs, and the erection thereon of the improvements hereinbefore mentioned, appropriated or devoted to any use whatever by any of the defendants thus claiming or having title thereto, and that by reason of these
19 last mentioned premises, the erection of such fence, if any there was by them or any of them so erected, did not within the meaning of the act of Congress, approved May 28, 1864, aforesaid, constitute an occupancy of the said lots nor an improvement thereof: Wherefore the plaintiffs show that this is a controversy arising under the laws of the United States.

Plaintiffs further show that the said premises so in controversy as aforesaid exceed in value the sum of five hundred, and the improvements by the said James Meskew erected thereon, and the right which the said James Meskew by the certain demise thereof hereinbefore set forth hath to occupy the said premises exceed, and each thereof exceeds, in value the sum of five hundred dollars.

Plaintiffs further show that the said Union Depot and Railroad Company hath lately assumed to convey the said lots in mortgage to one George W. Clayton and one David C. Dodge, as trustees.

To the end, therefore, that the said defendants the Union Depot and Railroad Company, George W. Clayton, David C. Dodge, Taylor, whose first name is to the the plaintiffs unknown, James H. Place, and one Tobey, whose first name is also to the plaintiffs unknown, the said
20 Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, John W. Smith may be summoned and made parties defendant hereunto, and required to answer this the plaintiff's bill of complaint, but not on oath, their oaths and the oaths of each of them to their respective answers being hereby expressly waived, and that they and each of them, their agents, officers, tenants, and all claiming authority under them, or either of them, may be strictly enjoined from intermeddling or interfering with the possession of the plaintiff, James Meskew, in and to the said premises, and from in any manner injuring, destroying, or tearing down the house and improvements of the said James Meskew erected upon the said premises, and that the said defendant the Union Depot and Railroad Company may be required to convey the said premises to the plaintiff Richard E. Whitsitt, or that the plaintiffs may have such further relief, or such other and different relief, as to equity shall seem meet, may it please your honor to grant to your orators not only the most gracious writ of subpœna under the seal of this honorable court, directed, etc., commanding, etc., but also the writ of injunction under the seal of the court, directed to the said Union
21 Depot and Railroad Company, George W. Clayton, David C.

Dodge, Taylor, whose first name is to the plaintiffs unknown, James H. Place, and Tobey, whose first name is also to the plaintiffs unknown, the said Denver, South Park, and Pacific Railroad Company, Walter S. Cheesman, John W. Smith, David C. Dodge, George W. Clayton, and all and singular their agents, officers, servants, tenants, and all claiming authority under them, or either of them, strictly enjoining and restraining them and every of them from interfering or intermeddling with the possession of the said defendant James Meskew in the said premises, and from intruding into or upon the said lots, or any part thereof, or destroying, damaging, or removing the said house and improvements of the said James Meskew on the said premises, or from inciting, encouraging, or suffering others so to do, and, as in duty bound, the plaintiffs shall ever pray.

(Signed) RICHARD E. WHITSITT.
(Signed) JAMES MESKEW.

(Signed) WELLS, SMITH & MACON,
Plaintiffs' Solicitors.

22 UNITED STATES OF AMERICA,
District of Columbia:

Richard E. Whitsitt, being first duly sworn, saith, on oath, that he is one of the plaintiffs in the above-entitled bill of complaint; that he hath heard the same read and knows the contents thereof, and the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) RICHARD E. WHITSILL.

Subscribed and sworn to before me this 5 day of May, A. D. 1880.
[SEAL OF COURT.] (Signed) EDWARD F. BISHOP,
Clerk Dist. Court U. S.

(Indorsed:) No. 483. Circuit court. Richard E. Whitsitt and James Meskew vs. The Union Depot and Railroad Company et al. For an inj. & other relief. Filed May 5, 1880. (Signed) Edward F. Bishop, clerk.

And the said chancery subpœna is in words and figures as follows, to wit:

23 *Chancery subpœna.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America to the Union Depot and Railroad Company, George W. Clayton, David C. Dodge, Taylor, James H. Place, Tobey, Denver, South Park and Pacific Railroad Company, Walter S. Cheeseman, and John W. Smith, greeting:

You and every of you are hereby commanded that you appear before the judges of the circuit court of the United States of America for the district of Colorado, in the city of Denver, in said district, on the first Monday in June next (it being the 7th day of June, A. D. 1880), to answer the bill of complaint of Richard E. Whitsitt and James Meskew, this day filed in the office of the clerk of said court, in said city of Den-

ver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the District of Colorado to execute and make due return.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court for the district of Colorado, at the city of Denver, aforesaid, this 5th day of May, in the year of our Lord one thousand eight
24 hundred and eighty, and of the Independence of the United States the 104th year.

{ SEAL CIRC'T C'T U. S. COLO. } (Signed) EDWARD F. BISHOP, *Clerk*

MEMORANDUM.—The above named defendants are hereby notified that unless they, and each of them, shall enter their appearance in the office of the clerk of said cour , at the city of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

(Signed) EDWARD F. BISHOP, *Clerk.*

Marshal's return.

DISTRICT OF COLORADO, *ss:*

DENVER, *May* 18*th*, A. D. 1880.

I have duly executed the within writ by personally delivering a certified copy to the within-named defendants, to wit, Walter S. Cheeseman and William Tobey, May 6th, A. D. 1880; James H. Place and John W. Smith, May 7th, A. D. 1880. Also served the Union Depot and Railroad Company by delivering a certified copy of the within to Walter S. Cheeseman, president of the said Union Depot and Railroad Company, at Denver, Arapahoe County, Colorado, on the 7th day of May, A. D. 1880. Also served the Denver, South Park and Pacific Railroad Company by personally delivering a certified copy of the within to Walter S. Cheeseman, vice-president of said Denver,
25 South Park and Pacific Railroad Company, at Denver, on the 8th day of May, A. D. 1880. Also served David C. Dodge and George W. Clayton by delivering a certified copy of the within to each of them at Denver, Arapahoe County, Colorado, on the 10th day of May, A. D. 1880. Also served Wm. E. Taylor by personally delivering a certified copy of the within to him at Denver, Arapahoe County, Colorado, May 18th, A. D. 1880. All of the above-named defendants served at Denver, Arapahoe County, Colorado, on the above-mentioned dates.

(Signed) P. P. WILCOX, *Marshal*,
By SIM. W. CANTRIL,
Deputy Marshal.

(Endorsed:) Gen. No. 483. Circuit court of the United States for the district of Colorado. In chancery. Richard E. Whitsett and James Meskew vs. The Union Depot and Railroad Company, Geo. W. Clayton, et al. Subpœna. Returnable to rule day, first Monday in June, A. D. 1880. , clerk. Filed this 18th day of May, A. D. 1880. (S'd) Edward F. Bishop, clerk, by F. W. Tupper, dep. clerk. Wells, Smith & Macon, of Denver, complainants' sol'rs.

And afterwards, and on the same day, to wit, the 5th day of May, A. D. 1880, the same being one of the regular judicial days of the May term, A. D. 1880, of said court, present, the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order refusing injunction.

26 RICHARD E. WHITSITT AND JAMES Meskew
vs.
UNION DEPOT AND RAILROAD COMPANY, George W. Clayton, David C. Dodge, Taylor, James H. Place, Tobey, The Denver, South Park and Pacific Railroad Company, Walter S. Cheeseman, and John W. Smith.

In chancery. For an injunction and other relief.

At this day come the said complainants, by E. L. Smith, esq., their solicitor, and the prayer of the said complainants for an injunction herein having been submitted and taken under advisement by the court, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be denied.

And afterwards, and on, to wit, the 22d day of May, A. D. 1880, came W. Teller, esq., and Bela M. Hughes, esq., solicitors of this court, and file in said court and in said cause their appearance for and on
27 behalf of the said defendants. And the said appearance is in words and figures as follows, to wit:

Appearance for defendants.

DISTRICT OF COLORADO, *ss:*

In the circuit court of the United States for the district of Colorado.

IN RE RICHARD E. WHITSITT ET AL.
vs.
THE UNION DEPOT AND RAILROAD CO., GEO. W. Clayton, et als.

We do hereby certify that we have been retained by, and appear in the above-entitled cause, for and in behalf of The Union Depot & Railroad Co., Geo. W. Clayton, et al., and for all the above-named defendants in said cause.

Dated at Denver, Colorado, this 8th day of May, A. D. 1880.

(Signed) WILLARD TELLER.
" B. M. HUGHES.

(Endorsed:) Gen. No. 483. Circuit court United States, district of Colorado. In the matter of R. E. Whitsitt et al. vs. Union Depot & Railroad Company & other def'ts. Attorneys' appearance, Mr. W. Teller et al., on behalf of def'ts. Filed this 22d day of May, A. D. 1880. (S'd) Edward F. Bishop, clerk.

28 And afterwards, and on, to wit, the 3d day of July, A. D. 1880, came the said defendants, by Teller, Hughes and Hughes, esqrs., their solicitors, and filed in said court and in said cause their demurrer to the bill of complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to bill of complaint.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court of the United States for the district of Colorado' A. D. 1880.

RICHARD E. WHITSITT AND JAMES MESKEW, plaintiffs,
vs.
THE UNION DEPOT AND RAILROAD COMPANY, The Denver, South Park & Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, Tobey, Walter S. Cheeseman, John W. Smith, defendants.

The demurrer of the defendants to the bill of complaint of Richard E. Whitsitt and James Meskew, the complainants.

29 The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said bill, and for several causes of demurrer doth now here show—

1st. That the complainants have not, in and by their said bill, made or stated such a case as entitled them in a court of equity to any relief from or against the defendants, any or either of them, touching the matters contained in said bill or any of such matters.

2d. That the complainants have not, as appears by their said bill, made out any title to the relief thereby prayed.

3d. That the said bill of complaint does not show therein that the subject-matter of said complaint is a controversy arising under the laws of the United States.

4th. That it appears by the said bill that if there is any controversy between the complainants and the defendants, or any or either of defendants, the same exists under the laws and statutes of the State of Colorado, which said controversy, if any at all, is within the jurisdiction wholly of the courts of that State.

30 5th. That the said bill of complaint of the complainants shows therein that the complainant, the said Whitsitt, never had nor has any right or title, of any nature whatever, to the lots mentioned in said bill, to wit, lots 15 & 16, in block 14, in the east division of Denver City, nor any interest therein, and that he never had and has no right to institute or bring his said bill of complaint in regard to the said lots or either of them against these defendants, or any or either of them, and that the said Meskew, his alleged tenant, did never have nor has any right, title, or interest whatever in the same lots, or either of them, and has no right and never had any right to institute or bring any bill

of complaint in regard to said lots, or either of them, against the defendants, or any or either of them.

6th. That the claims to said lots or real property in said bill mentioned, set up by the complainant, the said Richard E. Whitsitt, is, as appears by the said bill, wholly without the sanction or warrant of any law of the United States of America.

7th. That it appears by the said bill of complaint that the Union Depot and Railroad Company did acquire the legal title to said lots fifteen and sixteen, in block 14, in the east division of Denver, a long time before the filing of the said bill in this court, through a deed from
31 the probate judge of Arapahoe County (then in the Territory of Colorado, which is known now as the State of Colorado), and this prior in time to the pretended deed of a probate judge of the same county, issued to the said complainant, Richard E. Whitsitt, as said bill shows, many years after the said deed was issued, under which the said Union Depot and Railroad Company claims its title to said lots.

8th. That it appears by the said bill of complaint that the said Richard E. Whitsitt and his pretended tenant, the said James Meskew, are trespassers upon the said lots, and as such are not entitled to any hearing or consideration in a court of equity.

9th. That it appears by the said bill of complaint that the said George W. Clayton and David C. Dodge became entitled to a lien on said lots, and each of them, before the filing of the said bill of complaint, without any notice whatever of any claim upon, on, or to the same by the said Richard E. Whitsitt, and hold the same in good faith, and for a valuable consideration, without any such notice.

10th. That the said bill of complaint shows therein that the said complainant, the said Richard E. Whitsitt, has for a period of twelve years acquiesced in the assertion of divers rights to said lots, in
32 said complaint described and claimed now here by him; that he has been guilty of gross neglect in prosecuting his pretended claim to same, and is not now entitled, after such lapse of time, to the relief he claims, or any relief whatever, from or against these defendants, or any or either of them, in a court of equity.

(Signed) By WILLARD TELLER AND
B. M. & C. J. HUGHES,
Solicitors for Defendants.

We certify that, in our opinion, the foregoing demurrer of the above named defendants to the bill of complaint of the said Richard E. Whitsitt and James Meskew, complainants, is well founded in law, and proper to be filed in the above-entitled cause.

(Signed) WILLARD TELLER,
B. M. & C. J. HUGHES,
Solicitors for Defendants.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Walter S. Cheeseman, one of the defendants above named, on oath states that he has heard read the foregoing demurrer to the bill of complaint of Richard E. Whitsitt and James Meskew, in the above-entitled cause, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

(Signed) WALTER S. CHEESEMAN.

33 Subscribed and sworn to before me this 1st day of July, A. D. 1880.

[SEAL DIST. CT. U. S. COLO.] (S'd) EDWARD F. BISHOP,
Clerk Dist. Court U. S.

(Endorsed:) No. 483. In the U. S. circuit court, district of Colorado, A. D. 1880. Richard E. Whitsitt and James Meskew, pl'ffs, vs. The Union Depot & R. R. Co., the Denver, South P. & P. R. Co., W. S. Cheeseman, Geo. W. Clayton, D. C. Dodge, W. G. Taylor, et al., def'ts. In chancery. Demurrer of defendants to bill of complaint. Filed Jul. 3, 1880. (S'd) Edward F. Bishop, clerk. Willard Teller, B. M. & C. J. Hughes, sol'rs for def'ts.

And afterwards, and on, to wit, the 4th day of August, A. D. 1880, there was filed in said court and in said cause a certain stipulation of counsel as to argument of demurrer, &c., and the said stipulation is in words and figures as follows, to wit:

Stipulation as to argument of demurrer, &c.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court of the United States. In equity.

RICHARD E. WHITSITT ET AL.
vs.
34 THE UNION DEPOT AND RAILROAD Company et als. } Stipulation of counsel.

It is stipulated that the demurrer to the plaintiff's bill shall stand for argument at the next term of this court, and on such day as may be appointed by the judge thereof.

And, further, that the defendants, viz, The Union Depot and Railroad Company, The Denver, South Park & Pacific Railroad Company, D. C. Dodge and Geo. W. Clayton, may file, as an additional cause of demurrer, and as their separate cause of demurrer also (within 20 days hereafter), a paragraph raising the question of the statute of limitations to the said bill of complaint, relying on the 13th portion of the act of the general assembly of the State of Colorado, styled Limitations, page 597 of the general law of said State, barring certain suits after the period of five years has passed, "after the cause thereof shall accrue."

And, further, that the separate and special cause shall be argued at the time to be fixed as aforesaid for argument of the demurrer first herein filed.

Aug. 3, 1880.

(Signed) B. M. & C. J. HUGHES,
Sol'r for Def'ts.

(Signed) WELLS, SMITH & MACON,
Sol'r for Pl'ffs.

35 (Endorsed:) C. C., No. 433. R. E. Whitsitt et al., pl'ffs, vs. Union Depot & Railroad Co. et al., def'ts. Stipulation of counsel as to argument of demurrer, &c. Filed Aug. 4, 1880. (S'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 6th day of October, A. D. 1880, the same being one of the regular judicial days of the October term, A. D. 1880, of said court: present, the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order.—Demurrer sustained and bill dismissed.—Appeal taken.

RICHARD E. WHITSITT AND JAMES MESKEW
vs.
THE UNION DEPOT AND RAILROAD COMPANY, Taylor, Tobey, James H. Place, Geo. W. Clayton, David C. Dodge, The Denever, South Park and Pacific Railroad Company, Walter S. Cheeseman and John W. Smith.

483.—In chancery.—For an injunctson and other relief.

36

At this day comes the said complainants, by Thomas Macon, esq., their solicitor, and the said defendants, by Willard Tellar, esq., their solicitor, also comes.

And the demurrer of the said defendant to the bill of complaint herein coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said bill of complaint is not sufficient in law for the said defendants to answer unto, and the demurrer is sustained.

And thereupon the said plaintiffs say that they will abide by their bill of complaint.

Wherefore it is considered by the court that the said bill of complaint stand dismissed at the cost of the said complainant, to be taxed.

And thereupon the said complainant prays an appeal from the decree of dismissal aforesaid to the Supreme Court, which is allowed them, upon condition, nevertheless, that they file herein their bond on said appeal in the sum of five hundred (500) dollars, conditioned ac-

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cording to law, and with surety to be approved by a judge of this court.

And afterwards, and on, to wit, the 7th day of October, A. D. 1880, came again the said plaintiffs, by their solicitors as aforesaid, and filed in said court and in said cause their bond in appeal. And the said bond is in words and figures as follows, to wit:

Bond in appeal.

Appeal bond, U. S. court, Colorado.

THE UNITED STATES OF AMERICA,
District of Colorado:

Know all men by these presents that we, Richard E. Whitsitt and James Meskew as principals and Alfred H. Miles as surety, are held and firmly bound unto The Union Depot and Railroad Company, The Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, Tobey, Walter S. Cheeseman, John W. Smith, in the full and just sum of five hundred dollars, to be paid to the said The Union Depot and Railroad Company, The Denver, South Park & Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, Tobey, Walter S. Cheeseman, John W. Smith, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 7th day of October, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at the October term, A. D. 1880, of the circuit court of the United States, for the district of Colorado, in a bill in equity

pending in said court between said Richard E. Whitsitt, James Meskew, plaintiffs, and The Union Depot and Railroad Company, The Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, Tobey, Walter S. Cheeseman, John W. Smith, defendants, a decree was rendered against the said Richard E. Whitsitt and James Meskew dismissing their bill of complaint, and the said Richard E. Whitsitt and James Meskew having prayed and been allowed appeal to the Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to the said payees above named citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Washington, on the 2d Monday of October next:

Now, the condition of the above obligation is such, that if the said Richard E. Whitsitt and James Meskew shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) RICHARD E. WHITSITT. [SEAL.]
" JAMES MESKEW. [SEAL.]
" ALFRED H. MILES. [SEAL.]

Approved.
(Signed) MOSES HALLETT,
District Judge.

(Endorsed:) Gen. No. 483. Circuit court of the United States, district of Colorado. Richard E. Whitsitt, James Meskew, plaintiffs in error, vs. The Union Depot & Railroad Co. et als. Appeal bond. $500.00. Filed in the circuit court U. S., this 7 day of Oct'r, A. D. 1880. (S'd) Edward F. Bishop, clerk.

38 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or entered of record in said court, and in a certain cause lately in said court pending, wherein Richard E. Whitsitt et al. are complainants and The Union Depot and Railroad Company and others are defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 9th day of October, A. D. 1880.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Clerk's fees.

Preparing transcript, 82 folios, @ 10 c.	8 20
Clerk's certificate	35
Paid by E. T. Wells, for appellant	$8 55

(Indorsement on cover:) No. 1070. Richard E. Whitsitt and James Meskew, appellants, vs. The Union Depot & Railroad Company, The Denver, South Park & Pacific R. R. Co. et al. Colorado C. C. U. S. Filed 25th October, 1880.

OFFICE SUPREME COURT U. S.
FILED
NOV 26 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT.

October Term, A. D. 1880.

RICHARD E. WHITSITT,
JAMES MESKOW,
Appellants,
vs.
THE UNION DEPOT & RAILROAD CO., ET. AL.,
Appellees.

Appeal from the Circuit Court for the District of Colorado.

BRIEF ON THE PART OF APPELLANT.

The bill filed in the Circuit Court sets forth the settlement of the Denver Town Site, in the year 1858, by an association called The Denver Town Company, on lands then part of the public domain; that said Company opened roads, built bridges, &c., to facilitate access, and erected hotels, corrals, public stables, and other like public buildings; that the Town Company in May, 1859, allotted, set off, donated and conveyed the premises in controversy, to the Leavenworth and Pike's Peak Express Company; that in February, 1860, this conveyance was recorded in the office of the Recorder of the County; and by divers mesne conveyances, the title of the Express Company came to and was vested in the plaintiff Whitsitt; that the premises remained always vacant until possession assumed by plaintiffs as afterwards mentioned.

The bill further sets forth the passage of the Act of Congress, May 28, 1864, authorizing the entry of the town site; the entry by James Hall, Probate Judge, May 6, 1865; the issuance of the Patent July 1, A. D. 1868, and conveyance by said Hall, and

his successors in office, successively, investing the title to the premises in controversy in Amos Steck, Probate Judge.

That next after the entry of the lands, the said Hall, Probate Judge, gave notice thereof by publication, &c.; that on the 17th of July, 1865, within ninety days after the first publication of such notice, Ben Holliday, who by conveyance of the Leavenworth &c. Express Co., then held the legal estate, signed a statement in writing, containing an accurate description of the premises, and setting forth the specific right and estate, to-wit: an estate in fee claimed by him, and filed such statement in the office of the Probate Judge, as required by the statute.

That March 6, 1868, one Chase applied to one Downing, then Probate Judge, who on that day, without any notice to Holliday or any one claiming under him, and without any hearing or determination of the rights of the parties, or any action instituted for that purpose, conveyed the premises to said Chase.

That on the 17th day of April, A. D. 1878, the then Probate Judge, by deed of that date, reciting that it had been made to appear to him that the plaintiff, Richard E. Whitsitt, was the rightful owner by a regular chain of title from the Denver Town Company, &c., conveyed the premises to said plaintiff; that about the 22nd day of April, A. D. 1880, Whitsitt leased to Meskow for one year and delivered possession, who on that same day entered and erected a house of the value of $1,000.

That the Union Depot Company, claiming under said Chase, are threatening to destroy and tear down said house, and oust the said Meskow, the other defendants confederating and assisting.

That neither Chase nor any one under whom he claimed, was ever, in any manner, the occupant of the premises, nor the owner of any improvements thereon.

That defendants claim the deed of said Downing to Chase, is conclusive evidence that at the date of the entry of said lands, Chase was the rightful occupant of the lots, or the *bona fide* owner of improvements thereon, and that inasmuch as neither said Whitsitt, nor any under whom he claims, was, at the date of the entry, in actual occupancy of the said premises, plaintiffs can not be admitted to impeach the conveyance of said Downing to said Chase.

Whereas, plaintiffs claim and will insist that under the Act of Congress for the relief of the citizens of Denver, plaintiffs, by reason of such first actual occupancy of the premises, is lawfully entitled thereto, and that the said Union Depot Company hold the estate derived under the conveyance of said Downing to said Chase as trustee for said Richard E. Whitsitt; and that according to the true intent and meaning of the Act of Congress of May 28, 1844, the entry of said land by said James Hall, was in trust for the several use and benefit, not only of the then occupants of said land, and the *bona fide* owners of the improvements, according to their respective interests, and to the extent of their several and respective occupancy of and improvement upon the several lots in said Town Site, and no further, but also in trust for those who might afterwards, at any time, become the first rightful occupants of any of said lots, at that time unoccupied, or the *bona fide* owners of improvements on such lots:— all which will be denied by plaintiffs.

Wherefore, this is a controversy arising under the laws of the United States.

That the premises exceed in value five hundred dollars, and the term of said Meskow exceeds in value five hundred dollars.

Prayer that defendants be restrained from tearing down or destroying the house and improvements of plaintiffs; that the defendant, The Union Depot Company, be required to release and convey the premises to the plaintiffs, or that plaintiffs may have such further relief, or such other and different relief, as to equity shall seem meet, &c.

General demurrer for want of equity, and bill dismissed.

Other causes are assigned in the demurrer, to which it is not deemed necessary to refer.

The points upon which reliance is placed for the reversal of this decree are:—

1. That the Circuit Court erred in sustaining the demurrer.

2. The Circuit Court erred in dismissing the plaintiff's bill.

3. The Circuit Court decreed and determined, that although plaintiffs were the first occupants of the premises in controversy,

and the first to erect improvements thereon, such occupancy and improvement having its inception subsequent to the entry of the town site, created no right in the plaintiffs.

4. The Circuit Court decreed that the deed of the Probate Judge to the plaintiff Whitsitt, conferred no right upon plaintiffs.

All the Acts of Congress, and the Territorial Statutes, having reference to the matter in issue, are for convenience printed at length at the end of this Brief.

I.

The bill presents a controversy arising under the laws of the United States, of which, therefore, the Circuit Court might entertain jurisdiction independent of the citizenship of the parties.

Act March 3, 1875, § 1.

II.

The plaintiffs being the first occupants of the lots, are entitled to a conveyance thereof by virtue of such occupancy.

Prior to the passage of the pre-emption law of Sept. 4, 1841, the Congress had adapted the practice and rule of disposing of the public lands at public sale.

The same usage had been observed in respect to the disposition of lands which had been occupied, while still public, by towns and villages.*

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* See the Act authorizing the survey and sale of the site of Cincinnati, (2 Stat., 352.)

That of Detroit (2 Stat., 398). That of Shawneetown, (2 Stat., 591), (3 Stat., 113). An Act making further provision for settling the claims to land in the Territory of Missouri (2 Stat., 749). The Act for the sub-division and sale of the tract of lands at the foot of the lower rapids of the Sandusky river, (3 Stat., 308). An Act to authorize the appointment of a surveyor for the lands in the Northern part of the Mississippi Territory, and the sale of certain lands therein, (3 Stat., 375). This Act authorized the designation of ten sections for town sites, and the sale of the lots laid off therein at public auction.

An Act authorizing the disposal of certain lots of public ground in the City

The pre-emption law of Sept. 4, 1841, which inaugurated as the policy of the government, the rule which has since prevailed of disposing of the public lands to actual occupants, expressly excepted from its operation lands "within the limits of incorporated towns," lands "selected as the site for a city or town," and "lands occupied for the purposes of trade, and not agriculture." 5 Stat., 453, § 10.

So that from that time forward, the actual occupant of agricultural lands was entitled to a pre-emption at a specified acreage, while the settler upon town lands could obtain his title only by competition with all others at the public sales.

The Act of May 23, 1844, (5 Stat., 657), was intended to correct this anomaly, as sufficiently appears from the first clause, "That whenever any portion of the surveyed public lands have been or shall be settled upon and occupied as a town site, *and therefore not subject to entry under the existing pre-emption laws*, it shall be lawful * * * for the Judges of the County Court, * * to enter at the proper land office, * * the land so settled upon and occupied."

The Statute being intended as a supplement to the "existing pre-emption laws," is to be construed in connection with them, and unless the contrary appears, its benefits must be deemed to be extended to the same class of persons, to-wit: actual occupants; and to the same extent, to-wit: to the extent of their occupancy.

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of New Orleans, and Town of Mobile, (3 Stat., 465). An Act respecting the surveying and sale of the public lands in the Alabama Territory, (3 Stat., 466). This Act also authorizes the reservation of ten sections for town sites, and the sub-division into lots and the sale of the lots.

An Act providing for the sale of three several tracts of land in Tuscawara County, in the State of Ohio, and for other purposes, (4 Stat., 56).

An Act for laying off a town on Bean River, in the State of Illinois, and for other purposes, (4 Stat., 334).

An Act making provision for the sale and disposition of the public grounds in the Cities of St. Augustine and Pensacola, and to reserve certain lots and buildings for public purposes, etc., [4 Stat., 550].

An Act to establish a town at St. Marks, Florida, [4 Stat., 664].

An Act for laying off the towns of Fort Madison and Burlington, in the County of Des Monies, and the towns of Bellview, Du Buque and Peru, in the County of Dubuque, Wisconsin Territory, and for other purposes, [5 Stat. 70].

This conclusion, from the antecedent legislation, *in pari materia*, is supported by the letter of the Statute.

The entry of the lands by the corporate authorities, or the Judges of the County Court, it is declared shall be made "in trust for the *several* use and benefit of the *occupants* thereof, *according to their respective interests*."

It is supposed that upon this clause of the Statute, if it stood alone, no two opinions could be indulged.

But the Statute in another part provides that the entry shall be made in legal sub-divisions, &c., and, next after the clause above quoted, proceeds to declare that "the execution of which trust as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situate."

From these provisions it has been thought that the clause last cited, was intended to create a trust separate from and additional to that, for the several use and benefit of the occupants, declared in the previous language.

Cash's Appeal, 6 Mich., 193; City of Denver vs. Kent, 1 Colorado, 336.

It is submitted that the resolution in these cases is opposed both to the letter and the spirit of the act.

1. The language of that clause out of which the second trust, to-wit: for the sale of the unoccupied lots is derived, is "the execution of *which* trust as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory."

The word of reference "*which*," shows that the trust in respect to which the local legislature is authorized to prescribe rules, is the same before declared, to-wit: that "for the *several* use and benefit of the occupants, according to their respective interests."

2. The provision relied upon to enlarge the trust, is subsidiary to the principal object of the Statute.

It relates solely to the ways and means of distributing the bounty of the government. To give it effect to enlarge the number of the beneficiaries, is to violate the maxim *Accessorium non ducit principale.*

3. If from the words "as to the disposal of the lots in such town and the proceeds of the sales thereof," we infer that some portion of the lots are to be exposed for the competition of all comers, we must indulge the same conclusion as to all, for it clearly refers to all *the lots*, in every town site entered under the Statute.

The construction given by the Michigan Court, is at variance with the spirit and the general policy of the law.

The Statute was contrived to extend to the inhabitants of towns upon the frontier, the same privileges before extended to the settlers upon agricultural lands.

There are localities designated and marked by nature for the centers of population; localities which were the rallying points and bases of operation and supply, of our armies and those of other races,—both savage and civilized, before us,—to which the first occupants in peace congregated as inevitably as water seeks a level.

By the pre-emption law of 1841, and always before that, Congress had invariably reserved to the government the increase in the value of the public lands, occasioned by the formation of settlements at such localities.

Is it conceivable that it was the purpose of the act of 1844, to transfer these benefits to the first handful of settlers who might congregate at the frontier posts?

The Act of 1841 contained stringent provisions against engrossing the public domain for speculation; it required the pre-emptioner to make oath that he had not settled upon the land "to sell the same on speculation, but in good faith to appropriate it, to his or her own exclusive use and benefit."

This provision is retained to this day.

Is it conceivable that by the Act of 1844, it was intended to pave the way for speculation in town lots; while discouraging that in agricultural lands?

What special merit in the first settler or post trader, that he and his retinue of dependents should engross the whole of three hundred and twenty acres?

What special merit is there in associations like the Denver Town Company, to command the bounty of Congress?

At the date of the entry of these lands, it is probable that by far the larger part of the six hundred and forty acres, entered by the County Judge, was virgin prairie.

The actual occupants were enjoying all that the purposes of their residence or trade demanded; is it consistent with the language, or the legislation of Congress, that they should have more than this?

That those arriving before the 5th day of May, should have all; and those arriving after that day none?

But it is said in the Michigan case, that the unoccupied lots are to be sold, and the proceeds invested for the public purposes of the community as such; the erection of public buildings, the support of public schools, "or any other general purpose that will conduce to the interest of the community as such"—are suggested in the opinion of Mr. Justice Belford, in the case in Colorado.

Here again those who contend for the idea of a double trust, supply the supposed omissions of the Statute by their own inventions.

If the Statute does in truth create a double trust, then the first only is for the benefit of occupants,—and is restricted to their actual possessions.

As to the second, the beneficiaries are to be nominated by the local legislature. The legislature may dispose of the proceeds of sale for the benefit of the community of the town within which the lots lie; or for the benefit of some other similar community;

or for the benefit of the State at large; or they may donate them to any person or persons whomsoever, as their wisdom or caprice may suggest.

And this, in effect, is conceeded by the suggestion that the proceeds of the unoccupied lots, may be appropriated to permanent public improvements; for these, in the nature of things, inure not only to the inhabitants of the town at the date of the entry, but to all who come after them in perpetuity.

There is no necessity to accept the construction adopted by the Court below, in order to give effect to the clause in respect to the disposal of the lots, and the disposition of the proceeds of the sales thereof.

The lands are not donated by Congress to the County Judge; nor was it the intention that he should donate them to the occupants.

Each must pay his just share of the cost of the land entry; and of the execution of the trust; he obtains his title for a price. This is nothing more nor less than a sale; and these we submit are the sales mentioned in the clause in question.

III.

The plaintiffs are entitled to relief, by virtue of the conveyance of the Probate Judge, of April 17, A. D. 1878, if not by virtue of their prior occupancy.

The bill avers, and the demurrer admits, that the lots in controversy were vacant and unimproved at the date of the entry.

If the interpretation given to the Statute by the Court below shall prevail in this Court, then, as to these premises, the legislature had absolute power of disposal.

They might devote them to a public use, or allot them to any private person, supposed to be deserving in the premises.

This they attempted to do by the Act of February 8, A. D. 1872.

This Act was passed to supply the defects in the previous legislation of the Territory, supposed to have been developed by the decision of the Supreme Court, in *The City vs. Kent;* and to confirm the law touching the disposition of the unsettled lots to the view expressed in the majority opinion in that case.

The provisions of section 9, which we invoke to support the conveyance of the Probate Judge, of April 17, A. D. 1878, were in recognition of the equities of the many persons who had, in good faith, purchased the supposed title of the founders of the town, and by accident or their own default, had been prevented from receiving the conveyance of the Probate Judge.

The prior collusive conveyance to Chase, did not obstruct the legislative power in this respect:—being in confessed violation of the regulations prescribed by the Territorial Laws of 1864 (§§ 4, 5 and 8), it was void by the letter of the act of Congress.

IV.

If by reason of either actual prior occupancy, or the conveyance of the Probate Judge, of April 17, 1878, the plaintiffs are entitled to the premises, the defendant must be deemed to hold as a trustee, and may be compelled by decree to convey.

Silver vs. Ladd, 7 Wall., 228. Clayton vs. Spencer, 2 Colorado, 381.

V.

The lapse of time is no bar to the plaintiffs' equity.

1. Because, until February, 1874, there was no statutory limitation in Colorado, upon an action to recover real property.

Acts Colorado, 1874, p. 177.

2. The plaintiffs are entitled to relief, if at all, solely by rea-

son of their first actual occupancy; or by reason of the conveyance of the Probate Judge, of April 17, 1878.

Either of these events is sufficiently recent to exempt the case from the statutory bar, or the equitable maxim against stale claims.

AMOS STECK,
WELLS, SMITH & MACON,
For Plaintiffs in Error.

STATUTES

Referred to in the foregoing Brief.

AN ACT for the Relief of the Citizens of Towns upon the Lands of the United States, under certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled, and occupied, in trust, for the several use and benefit, of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated: *Provided*, that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty fourth April, one thousand eight hundred and twenty, and shall not in the whole exceed three hundred and twenty acres; *And Provided, also*, That any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall

be void and of none effect; *And Provided, also*, that the corporate authorities of the town of Weston, in the County of Platte, State of Missouri, or the county court of Platte county, in said State, shall be allowed twelve months, from and after the passage of this act, to enter at the proper land office, the lands upon which said town is situate.

Approved May 23, 1844.

~~(13 Stat. 94.)~~ 5 Stat. 659

AN ACT for the Relief of the Citizens of Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That the provisions of an act of Congress entitled "An act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances," approved May 23, 1844, be so extended as to authorize the probate judge of Arapahoe county, in the Territory of Colorado, to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the bona fide owners of the improvements thereon, according to their respective interests, the following legal sub-divisions of land, or such portions thereof, as are settled and actually occupied, for town purposes by the town of Denver aforesaid, to-wit: Section number thirty-three, and the west half of section number thirty-four, in township number three south of range number sixty-eight west of the sixth principal meridian: *Provided, however*, That there shall be reserved from such sale and entry, such blocks or lots in the town of Denver as may be necessary for government purposes, to be designated by the commissioner of the general land office.

SEC. 2. *And be it further enacted*, That in all respects except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of twenty-third May, eighteen hundred and forty-four, and the rules and regulations of the commissioner of the general land office.

Approved May 28, 1864.

~~(13 Stat. 659.)~~ 13 Stat. 97

AN ACT Prescribing Rules and Regulations for the execution of the Trust arising under the Act of Congress, entitled "An Act for the Relief of Citizens of Towns upon lands of the United States under certain circumstances."

Be it [enacted] ordained by the Council and House of Representatives of Colorado Territory:

SEC. 1. When the corporate authorities of any town, or the judge or judges of the county court, for any county in this Territory, in which any town may be situated, shall have entered at the proper land office, the land or any part of the land settled and occupied as the site of such town, pursuant to, and by virtue of the provisions of the act of Congress, entitled "An act for the relief of citizens of towns, upon lands of the United States, under certain circumstances," passed May 23, A. D. 1844, and any amendments that may be made thereto, it shall be the duty of such corporate authorities, or judge, or judges, (as the case may be), and they are hereby directed and required to dispose of and convey the title to such land, or to the several blocks, lots, parcels, or shares thereof, to the persons hereinafter described, and in the manner hereinafter specified.

SEC. 2. Any such corporate authorities, or judge, or judges, holding the title of such lands in trust, as declared in the said act of Congress, shall be a good and sufficient deed of conveyance, to grant and convey the title to each and every block, lot, share, or parcel of the same, to the person or persons who shall have, possess, or be entitled to the possession or occupancy thereof, according to his, her, or their several and respective rights or interest in the same, as they existed in law or equity, at the time of the entry of such lands, or to his, her or their heirs or assigns, and when any share or parcel of such lands shall be occupied or possessed by one or more persons claiming the same by grant, lease or sale from one or more other persons, the respective rights and interests of such persons in relation to each other in the same, shall not be changed or impaired by any such conveyance. Every deed to be made by such corporate authorities, or by such judge or judges, pursuant to the provisions of this act, shall be so executed and acknowledged as to admit the same to be recorded.

SEC. 3. Within thirty days after the entry of any such lands, the corporate authorities, or judge or judges entering the same, shall give public notice of such entry, by posting notice thereof in at least three public places in such town, and by publishing such notice in a newspaper printed and published in the county in which such town shall be situated, or, in case there shall not be any newspaper published in such county, then in some newspaper printed and published nearest to such town in this Territory. Such notice shall be published once in each week, for at least three successive weeks, and shall contain an accurate description of the lands so entered, as the same is stated in the certificate of entry, or duplicate receipt for the purchase money thereof, given by the land officers at the time of such entry.

SEC. 4. Each and every person or association, or company of persons, claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent, or attorney, sign a statement in writing, containing an accurate description of the particular parcel or parts of land, in which he, she or they claim to have an interest, and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to or into the office of such corporate authorities, judge or judges, and all persons failing to sign and deliver such statement, within the time specified in this section, shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity.

SEC. 5. In case there shall be adverse claimants to such lands, or to any part, parcel or share thereof, either party may bring a suit in chancery against the adverse claimant or claimants, in the district court of the judicial district, or in any court of competent jurisdiction, and in the county in which the lands shall be situated, or in any county to which the county in which such lands shall be situated, is attached for judicial purposes: *Provided always*, That no judge of the district court, or probate judge, who has been an adverse claimant, directly or indirectly, of any portion of the lands embraced within such town, or who is a party to any action brought to determine the right to a con-

veyance of any portion of the lands within such town, shall entertain, hear or determine any proceeding, interlocutory or final, in any action brought to determine any such claims, by or between any parties whomsoever, but in all such cases, if the cause or proceeding shall be pending in a district court, the judge thereof shall order all papers, with a transcript of the record in the cause, to be transmitted to another judicial district, as in cases of change of venue, and if the cause or proceeding shall be pending in a probate court, the judge thereof shall order all papers with a transcript of the record, to be transmitted to the probate court, of the nearest county, where the cases complained of do not exist, as in cases of change of venue. and the cause shall proceed in the court to which the same be removed, in the same manner as if originally instituted in that court; *Provided, also*, that the laws applicable to a change of venue, shall apply to actions brought under this act; *And, Provided, also*, That nothing in this act shall prevent the district judge of the district in which any such lands are situated, from executing any and all conveyances of such lands, pursuant to the determination of such action. Suits brought under the provisions of this act, shall be brought against adverse claimants as defendants, and it shall not be necessary to make the judge or corporate authorities holding the trust, parties thereto, except as provided in section nine of this act. The complainant's bill shall show what interest or estate in the lands in controversy the complainant claims, and defendant shall answer such bill as in cases of chancery. Pleadings and proceedings in such actions shall be as in cases in chancery, except that oral testimony may be introduced upon the trial of the cause.

SEC. 6. Upon the trial of any such action, either party may give, in evidence, the statement mentioned in the fourth section of this act, deposited by the other, or by the person under whom he or she claims, with the corporate authorities, or judge or judges, holding the title to the lands in controversy therein, and the person or persons who shall have first acquired the right to the possession or occupancy of such lands, either in person or by agent, attorney, servant or tenant, or those claiming under him, her or them, shall in any such action be deemed to have the prior and permanent right to such lands, and any rule of law or equity which would prevent a determination in accordance with such private right, shall be disregarded in such action.

Upon the trial of any such action, the evidence of the witnesses, if not in the form of depositions, shall be reduced to writing, and being certified by the presiding judge, shall be filed with the papers in the cause. *Provided*, That nothing in this section shall be so construed as to recognize the right of any person or persons, who have virtually abandoned any land held as a town site, to any title therein.

SEC. 7. Appeals and writs of error shall be allowed, and may be taken and prosecuted from the judgements or decrees of the courts, in proceedings under this act, to the supreme court, as in other cases.

SEC. 8. In case suits shall not be brought, as provided in this act, for the purpose of settling or determining any controversy between adverse claimants to any such lands, within sixty days after the expiration of the time for filing the statement as provided in section four of this act, if the title to such land shall be held by any judge, it shall be the duty of such judge to summon the adverse claimants to appear before him, at a time and place to be mentioned in such notice, and which place shall be within the county in which such land shall be situated, and make their proof and allegations in reference to such adverse claims, at the time and place of the return of such summons. If the same shall have been served as provided in this act, the judges shall, if the parties appear, proceed to hear their proof and allegations, and shall thereupon determine in writing, the controversy between them. Upon such hearing, the statements of the parties respectively deposited with such judge, as required by the fourth section of this act, shall stand for their pleadings, and neither party may use in evidence the statement by the other, or by the person under whom he or she claims. The evidence of the witnesses sworn upon such trial, shall be reduced to writing, and any witness who shall, upon such hearing, wilfully and knowingly testify falsely, shall be deemed guilty of perjury. Any such judge or justice of the peace, may issue subpœnas to compel the attendance of witnesses upon such hearing, and any person served with such subpœna shall be deemed guilty of contempt of said judge, and may be attached to answer such contempt, and to testify in the case. There shall be no postponement in the hearing of such cases, except for cause. The summons issued by the judge, and all subpœnas issued in such cases,

shall be directed and served in the same manner as in actions at law, except that such summons, in case where the person named therein cannot be found, may be served upon the agent or attorney, who shall have filed the statement mentioned in section four of this act. The fees of the officers and witnesses in such cases, shall be the same as for like services in actions of court of record. Either party in any such case may appeal from the determination of any such judge therein, to the supreme court, in the same manner that a party may appeal from any judgment in an action at law in the district court. If an appeal shall be allowed, the judge shall transmit to the clerk of the supreme court, a transcript of the statements standing for the pleadings in the case, the evidence and the determination of the judge in writing.

In case any party lawfully summoned to appear before such judge, as mentioned in this act, shall fail to appear at the time and place mentioned in the summons, he shall be deemed to have waived and relinquished all right, title and interest and estate in the said lands so in controversy, and each and every piece, parcel and share thereof, and shall be forever barred from asserting or claiming any right, title, interest or estate therein.

SEC. 9. If in a case mentioned in section eight of this act, the title to any such lands shall be held by the corporate authorities of any town, such corporate authorities may bring an action in the district court of the judicial district, and in the county in which the lands in controversy shall be situated, or in some county to which such county shall be attached for judicial purposes, to settle and determine such controversy. Such suit shall be commenced on the chancery side of the court, by bill, in the nature of a bill in [of] interpleader, which bill shall set forth, a description of the lands claimed by adverse claimants, and the character and extent of the right or interest or estate therein, claimed by each, as the same shall appear by the statements deposited with such authorities, pursuant to section four of this act, and the names of all adverse claimants who shall have filed such statements, and shall pray that the several adverse claimants shall be required to appear in such court and prosecute such claim or be forever barred therefrom. Any claimant to such land, who shall fail to appear and answer such bill, and thus prosecute his claim to the land described in such bill, pursuant to the summons in such case and the practice of the district court, shall be

forever barred of the right to assert any claim or title to the lands in controversy, adverse to the other claimants, their representatives or assigns, elsewhere, or in any court whatsoever. If the adverse claimants to the lands described in the bill, in such case shall appear, they shall respectively answer such bill, and either disclaim any right, title or interest or estate in the land described, or set forth the nature, character and extent of the title, interest or estate which he, she or they respectively claim therein. Issues between such adverse claimants, made by their answers to such bill, may be brought to a hearing, and shall be determined, and such determination may be received by the supreme court, in the same manner and by the same rules of law and evidence, as in other cases mentioned in sections five, six, and seven of this act.

SEC. 10. Whenever any summons issued under the provisions of this act, cannot be served upon the person or persons named therein, nor upon the agent or attorney of such person or persons, who shall have filed a statement, as required in the fourth section of this act, and the complainant or judge, as the case may be, shall file an affidavit, as provided in the eighth section of "an act concerning practice in chancery," approved Oct. 4, 1861, it shall be lawful for the judge, or the clerk of the court, as the case may be, to cause publication to be made, as provided in said section of said act, concerning practice in chancery, and when such publication shall have been made, the cause shall proceed as if the parties had been personally served with process.

SEC. 11. As soon as may be after the expiration of sixty days from the first publication of the notice, mentioned in the third section of this act, the corporate authorities, judge or judges holding the title to the lands described in such notice, shall make a true statement in writing, containing a true account of all monies, by him or them expended in the acquisition of the title, and the administration or execution of the trust to that time, including the monies paid by him or them for the purchase of said lands, all necessary travelling expenses, all monies paid for publishing and posting such notices, and for proof thereof, and for all other necessary and proper expenses incident to such trust, and also a true account of his or their charges for time and services, employed in the business of such trust, to that time. The whole amount of such account for monies and reason-

able charges for compensation, shall be a charge upon the lands so held in trust, in favor of the trustee, and shall be paid by the several claimants entitled to such lands, in proportion to the several quantities or shares thereof to which they may be respectively entitled.

SEC. 12. Before the corporate authorities, or judge or judges holding any such lands in trust, as aforesaid, shall be required to execute, acknowledge or deliver any deed of conveyance thereof, as hereinbefore mentioned, to any person or persons claiming to be entitled to such deed, such person or persons shall pay or tender to him or them the sum of money chargable on the part thereof, to be conveyed by such deed, according to the statement or account mentioned in the eleventh section of this act, the amount to be determined by the proportion which the quantity of the land to be described in such deed, shall bear to the whole quantity of the land of which it is a part, compared with the whole amount thus charged upon the whole quantity of land, together with the interest on each of the money items of such account, at the rate of twenty-five per centum per annum, from the time when the same account, and also such further sums as shall be a reasonable compensation for preparing, executing and acknowledging such deed, and the fees of the officers taking the acknowledgment thereof: *Provided*, That no mayor or judge holding such lands in trust, shall be entitled to receive more than fifty cents for a deed containing the description of one lot, block or parcel of land, nor more than five cents for each additional lot, block or parcel of land described in such deed, and no clerk of any incorporated town, shall be entitled to receive more than ten cents for attesting with the seal of such town, the execution of any deed by the corporate authorities of such town.

SEC. 13. After the expiration of ninety days from the time of the first publication of the notice mentioned in the third section of this act, the corporate authorities, or judge or judges, holding the title to the lands described therein, shall, upon a reasonable demand or request, and upon the payment or tender to him or them of the moneys mentioned in the twelfth section of this act, execute, acknowledge and deliver to each and every claimant, or association, or company of claimants to such lands, or any lot, block, parcel or share thereof, a deed of conveyance thereof, as prescribed in the second section of this act, and according to the

statement made and deposited by him or them, pursuant to the fourth section of this act: *Provided, however*, That no such deed of conveyance shall be acknowledged or delivered for any part, lot, block, or share of such lands, to which there shall be adverse or contesting claimants, until the controversy thereon shall have been settled or determined, in the manner hereinbefore prescribed, and whenever any such controversy shall have been so settled and determined, the corporate authorities, or judge or judges, shall, upon the like demand, or request, and the like payment or tender, and by the like deed of conveyance, convey the lands or interest or share therein, the right to which shall have been thus ascertained, to the person or persons thereby determined to be enti tled to the same.

Sec. 14. When a town site is entered, under the act of Congress mentioned in this act, by the corporate authorities of any incorporated town, deeds shall be made by the mayor or other chief officer of such town, for the time being, under the corporate seal of such incorporated town, and attested by the clerk or register of such town, and if such incorporated town have no seal, then under the scrawl or private seal of said mayor or other chief officer, attested by the clerk or register, as aforesaid. When the land is entered by the judge or judges of the county court, deeds shall be signed by such judge or judges, under his or their private seal or scrawl.

Sec. 15. In case any judge who shall have entered any such land under the provisions of the said act of Congress, and thus become the sole trustee thereof, shall be possessed of or entitled to the same, or any part, lot, block or share thereof, according to and by virtue of the provisions of this act, and his claim or right shall not be claimed adversely to him by any person; he shall be, and be deemed to be seized and possessed of the title thereto, and the estate therein, to his own use, in fee simple, absolute, free, and discharged of such trust, and no conveyance other than the patent of the lands, including the same shall be necessary to perfect his absolute title thereto.

In case such land or interest, or share in such land, so claimed by such judge, shall be claimed by any other person or persons adversely to him, the conflicting claims between him and such other person shall be adjusted by settlement, or action, as hereinbefore prescribed, and in such case of action at law, the issues

therein shall be tried before some judge who shall be disinterested, and possessed of competent jurisdiction to hold court for the trial of and to render judgment in such action.

SEC. 16. For all the purposes of determining the rights of adverse claimants to any lands so entered, pursuant to the said act of Congress, the corporate authorities, or judge or judges hereinbefore mentioned, shall be deemed to possess and hold the title to the lands so entered in such trust, from the time of the entry thereof.

SEC. 17. The costs in the actions mentioned in this act, and in proceeding before the judge, as prescribed in the eighth section of this act, shall [be] regulated and recoverable as in other civil actions.

SEC. 18. If the title to any such lands shall be vested in any judge, such judge shall convey to the people, or to the legal authorities, the land used or laid out by the town authorities, as streets, lanes, avenues, parks, commons and public grounds, within such time as is herein prescribed for making conveyances to individuals.

SEC. 19. Whenever the title to such lands shall be held by the corporate authorities of any town, all lands used, laid out, or designated for public use by such corporate authorities, as streets, lanes, avenues, alleys, parks, commons and public grounds, shall rest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whomsoever, and it shall not be necessary to execute any conveyance for the same, to the corporation or the people of such town.

SEC. 20. Each and every person and association and company of persons who shall be entitled to any lots, pieces or parcels of land, held in trust under the act of Congress aforesaid, by the authorities of any incorporated town, and respecting which there shall be no controversy, shall, within three months after the expiration of the time mentioned for filing statements, pay or tender to the corporate authorities, holding such lands in trust, the sum of money chargeable upon such lot, pieces or parcels of land, together with the interest thereon, and fees for preparing, executing and acknowledging a deed to such lands, and in case of a failure so to do, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such

lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title interest, or estate therein, and such incorporated authorities, shall thereafter be and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust, and no conveyance other than the patent of the lands including the same, shall be necessary to perfect their absolute title thereto, and any person or persons who shall be entitled to any lots, parcels or pieces of land, held in trust by any incorporated authorities, as aforesaid, and respecting which there has been adverse claimants, shall, within three months after the final determination of any action between the adverse claimants, respecting such lands, pay or tender to such incorporated authorities, holding such lands in trust, the sum of money chargeable upon such lots, pieces or parcels of land, together with the interest and fees for preparing, executing and acknowledging a deed to such lands, and in case of a failure so to do, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title interest, or estate therein, and such corporate authorities shall be, and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust and no conveyance other than the patent to the lands including the same, shall be deemed necessary to perfect their absolute title thereto.

SEC. 21. Probate judges are hereby declared to be county judges for the purpose of executing the trust mentioned in said act of Congress.

SEC. 22. This act to take effect and be in force from and after its passage.

Approved March 11th, 1864.

(Acts Colorado, 1864, p. 139.)

AN ACT to Provide for the further Execution of the Trust relating to the Town Site of the City of Denver, and to regulate the same.

Be it enacted by the Council and House of Representatives of Colorado Territory:

SEC. 1. That the Probate Judge of the County of Arapahoe and Territory of Colorado, shall proceed and make, or cause to be made as soon as practicable after the passage of this act, a list of all town lots or parcels of land embraced within section number thirty-three (33), and the west half of section number thirty-four (34), in township number three (3), south of range number sixty-eight west in said county, to which no person, association of persons, or body corporate, except the City of Denver, filed any claim, with the Probate Judge of said county on or before the 9th day of August, A. D. 1865: *Provided*, That said list shall not embrace such lots and lands as have since the date last aforesaid been deeded in good faith by any Probate Judge of said county to any rightful owner thereof, holding the same by proper chain of title under and from the Denver Town Company. * * * * * * * * * * *

SEC. 2. The Probate Judge of said county shall immediately, upon the preparation of said list, proceed and advertise said lots and lands for sale, in some newspaper published in said city, for sixty days, at public vendue, to the highest and best bidder for cash in hand, and shall, upon the day and at the time and place mentioned in such advertisement, proceed and sell the same to the highest and best bidder therefor for cash.

SEC. 3. If any person or persons shall, prior to the time of said sale, file his, her, or their petition in writing, before said judge, showing that he, she, or they, have, at any time, either before or since the entry of said lands, acquired an interest in any lot or lands so listed as aforesaid, by purchase or occupation, in good faith, without actual notice of the legal defects to the title thereof, and that he, she, or they, had also, prior to the 25th day of January, 1872, improved such lot, lots, or lands, by the erection of a dwelling house thereon, setting forth the particular facts in relation thereto, and the time at which such rights occurred and facts transpired, it shall be the duty of said

judge to set the matters and allegations of such petition down for hearing; and if the petitioner or City Attorney of said city requests it, the said judge shall impanel a jury of six men, who shall take an oath to faithfully inquire into the facts alleged in the petition, and a true verdict give as to their truth; and said jurors shall have the same qualifications and powers, and shall be impanelled in the same manner, as respects challenges, and in other respects as in civil cases; and, if upon the trial, such jury, or the said court, in case no jury is demanded as aforesaid, shall find the facts stated in such petition to be true, and that the petitioner or petitioners have erected a dwelling house on such lot or lots, it shall be the duty of said judge to withdraw such lot, lots or lands from said list, and upon the payment to him of the cost of such trial, and his reasonable fees and expenses, shall execute and deliver to such petitioner or petitioners a deed or deeds, granting and conveying to him, her or them the fee simple title to any such lots or lands. The trial in any such case as is contemplated by this section of this act, shall be final and conclusive on the City of Denver, and on all parties, unless for good cause, or because the same is manifestly unreasonable, or contrary to evidence, the court shall set aside the verdict of the jury, but no more than two new trials shall be allowed in any one case.

SEC. 4. The said Probate Judge shall make, execute and deliver to the purchaser or purchasers of any such lots or lands sold by virtue of this act, a deed or deeds, granting and conveying to him, her or them, the fee simple title therein, which deed shall vest in the grantee thereof all the title therein; and shall authorize and empower him, her or them, to bring and maintain all such suits in ejectment or other suits and proceedings as may be necessary for the cancelling of any deed or deeds theretofore made, wrongfully or fraudulently, by any former Probate Judge.

SEC. 5. Said Probate Judge shall make or cause to be made and kept, a record of all or any such lots or lands so sold, showing the advertisement, the parcels of lands, or lots sold, the price paid, and the persons to whom sold and deeded.

SEC. 6. The said Probate Judge shall give ten (10) days previous notice, in some daily newspaper published in said city, of the time when he will commence making said list of lots and lands, and shall sit from day to day, for the purpose of preparing the same, at which the City Attorney or any citizen, on the part of the city, shall have the right to be present, and may sug-

gest to said Judge, by petition, any lots or lands that may have been omitted, and that any filing or filings theretofore made, which may appear to have been made on or before the 9th day of August, 1865, were in fact made after that time, and it shall be the duty of said Probate Judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same.

SEC. 7. All moneys arising from any sale of said lots, or lands, shall be paid over by the purchaser to the treasurer of said city of Denver, for the use and benefit of the public schools of said city, and shall be distributed to the different boards of school directors of said city, as the city council may direct.

SEC 8. The city council shall audit and allow any reasonable bill or bills of said Probate Judge for making said list of lots, and for making said sales, and the expenses thereof, and shall order the same paid out of any money received as aforesaid.

SEC. 9. The owner or owners of any lots, or lands within the limits aforesaid, to which deeds have heretofore been made by any Probate Judge of said county, who may be the rightful owners thereof, holding the same by proper chain of title, under and from the Denver Town Company, may at any time hereafter apply to said Probate Judge for a deed, or deeds, to the same lots, or lands, and on such application, and the payment to him of his reasonable fees and expenses of executing the same, it shall be the duty of said Judge to execute and deliver a deed, or deeds, to such owner or owners, granting and conveying to such owner or owners the fee simple, in and to such lots and lands, notwithstanding the said claimants or their assignors may have failed to file their claim or claims to said lots or lands on or before the 9th day of August, 1865, as required by law, and such deed or deeds so as aforesaid issued by said Judge, shall vest in the grantee or grantees thereof the legal title in fee simple to said lots or lands.

SEC. 10. All acts or parts of acts inconsistent with this act, insofar as they are inconsistent, are hereby repealed.

SEC. 11. This act shall be in force and take effect from and after its passage.

Approved, February 8th, 1872.

(Acts Colorado, 1872, p. 191.)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1880.

RICHARD WHITSITT, JAMES MESKOW, *Appellants,* *vs.* THE UNION DEPOT AND RAILROAD CO. *et al.*, *Appellees.*	*Appeal from the Circuit Court, for the District of Colorado.*

BRIEF AND ARGUMENT OF THE COUNSEL FOR APPELLEES.

The counsel for the appellees contends that the demurrer should be sustained, and that every point therein made is well taken.

I.

Under the first, second, fifth, sixth, seventh, eighth and ninth points of the demurrer the appellees show that the appellants have no title to any relief whatever; as it appears by their bill that Whitsitt acquired no right to the lots

in controversy, from Holladay, who it is alleged, filed his claim to the same in proper time, but as it appears by said bill, was not a beneficiary provided for by the act of Congress entitled "An Act for the relief of the citizens of Denver, in the Territory of Colorado," approved May 28, 1864, being neither "an occupant" of said lots, or "a *bona fide* owner of improvements thereon," "at *the time of the entry of the lands, included* in the act, by the Probate Judge." The bill expressly states these facts, and the Supreme Court has passed upon their effect, holding that the benefit of the act, in regard to Denver, is confined to occupants of lots, and owners of improvements thereon, at the date of the entry of the town site by the trustee. (Folio 16 of record.)

See Cofield vs. McClellan, 16 Wallace, p. 333, affirming that case on appeal from the Supreme Court of Colorado.

Appellant Whitsitt, in said bill shows, that the Probate Judge of Arapahoe county, the trustee under the said act of Congress, on the 6th day of March, 1868, conveyed by deed the said lots to one Edward Chase, under whom, through divers deeds of conveyance, the Union Depot and Railroad Company, and the said mortgagees Clayton and Dodge, claim title at this date; which, until the filing of the bill in this cause, on the 5th day of May, 1880, had never been assailed. (Folio 12 of record.)

But to avoid this legal title thus held by others for twelve years, the appellants show that on the 22nd day of April, 1880, one of them, Whitsitt, leased the lots in dispute to his co-appellant, Meskow, and at the same time Meskow entered upon, or to use a western phrase, "jumped" said lots, and put up a house thereon; and that thus he, Whitsitt, became the first occupant of said lots, and as such is entitled to hold the same, under the said act of Congress, contending that the said act was passed "for the benefit *not only* of

the *then* occupants of the said land, (the city tract), and the *bona fide* owners of the improvements thereon," but "for the benefit of those who might afterwards *at any time* become the first rightful occupants of any of the lots in said town site:" in short, that it was a prospective pre-emption law. (Folios 13, 15, 17, 18 and 19 of record.)

In reply to this absurd proposition we need only refer to the language of the said act of Congress, section one, and the construction given to the same by this Supreme Court, in the case cited above in 16th Wallace, which case was an appeal from the Supreme Court of Colorado, involving title to lots in Denver, and it was believed, had finally settled any question that might arise under said act, in regard to what class of persons should be deemed beneficiaries under its provisions.

The Supreme Court of Colorado, at February term, 1871, in Denver City vs. Kent *et al.*, held, that the Probate Judge held the title to the town site in trust for the occupants of the several lots, and that lots unoccupied or unimproved were held by that trustee in trust for the *community*, viz: The inhabitants of the city at large, and for the public use or benefit.

See 1st Colorado Rep., p. 336, which followed the case cited as Cash's Appeal, 6 Michigan Rep., 193.

Following the cases cited of Cofield vs. McClellan, and Denver City vs. Kent *et als.*, *supra*, the Supreme Court of Colorado has constantly held that the trust in the Probate Judge was for the benefit of the occupants of lots, and the owners of the improvements thereon, at the date of the entry of the Judge, and that it extended no further to individuals outside of that class.

Cook vs. Rice, 2 Colorado, 131.
Clayton vs. Spencer, *Ib.*, 378.
Adams vs. Binkley, 4 Colorado, 247.

These cases, in harmony with the decision of this Court in the case of Cofield vs. McClellan, 16 Wallace, *supra*, have established a rule of property, and as to a rule of that nature, in the language of this Court, held in Grignon's lessee vs. Astor, 2 Howard, 343, ' They are rules of property on which the repose of the country depends."

The rule laid down is a correct one, but if it were not, we might cite a hundred cases to show the impropriety of changing it at this day. At the risk of proving tedious, we refer simply to chapter XLI, Wells on *Stare Decisis and Res Adjudicata.*

The appellant, Whitsitt, in his bill sets up a deed from Amos Steck, a Probate Judge of Arapahoe county, made to him for said lots, and dated April 17, 1878, *more than ten years* after a former Probate Judge had made the deed to Edward Chase for the same lots! (Folio 12 of record.)

We submit that the power of the Probate Judge as a trustee was exhausted, in regard to the disputed lots, when Downing, the Probate Judge, on the 6th day of March, 1868, conveyed the legal title to Chase. (Folio 12 of record).

The Supreme Court of Colorado has decided that a conveyance made by a Probate Judge, acting as a trustee under the said act of Congress, and the act of the Legislature of Colorado, passed in pursuance thereof, approved March 11, 1864, (Acts of Colorado, 1864, p. 139,) passed the legal title to the grantee, and that a succeeding Probate Judge had no power over the same.

Cook vs. Rice, 2 Colorado Rep., p. 136.

However, the appellants in this bill, do not appear to have relied much, if at all, on the deed made by the Probate Judge, Steck, to Whitsitt, for the lots; and seem to base the right of Whitsitt to said lots, on his being the *first occupant* of the lots, dating his possession on the 22d

day of April, 1880, two years after the so-called deed from Judge Steck was made to him. (Folios 13, 16, 17 and 18 of record).

Under this head of discussion, we call attention to the fact, that the bill of the appellants shows not only that the Union Depot and Railroad Company held the legal title to said lots, (subsequently mortgaged to said Clayton and Dodge, and prior to the filing of said bill in the Court below, folio 19 of record,) but that the said Depot and Railroad Company was in actual possession thereof when plaintiffs jumped said lots, (folios 14, 15, 17 and 19,) by a fence about the same; had a railway track on the premises, and a large amount of building material thereon also; and further shows that the said appellants entered as trespassers upon the said lots, jumping the same, in violation of the rights of said company, on the 22d day of April, 1880, and as such trespassers are not entitled to hearing or consideration in this Court, this proceeding on the part of the plaintiffs being to quiet the possession of parties who show no title to the property involved, and only show a flagrant trespass on the clear, legal rights of another. (Folios 13, 14, 15 and 19.)

Conway, Exparte, 4 Ark. 302.
McGee vs. Smith, 1 C. E. Green, 462.

It appears by said bill, that the Union Depot and Railroad Company acquired the legal title to said lots in good faith, and without notice of the fact, if it was one, that Edward Chase had twelve years previously obtained the deed of the Probate Judge for said lots, without, as said bill states, being entitled to the same, under the said act of Congress, and the act of the Legislature of Colorado passed in pursuance thereof; and it also appears by said bill that Clayton and Dodge, obtained a lien as mortgagees on said lots, without any such notice whatsoever, and that the said

company, and the said mortgagees, are entitled to the protection of a Court of equity as purchasers in good faith, and for valuable consideration. (Folios 13, 14 and 19.)

It will be seen that the said bill alleges that the Union Depot and Railroad Company, one of the appellees, claims the legal title to said lots, and that the same were mortgaged to Clayton and Dodge by said company, and in the absence of any allegation that there was *no* consideration for said title, and none for said mortgage, it will be presumed that there was a valuable consideration for the same, the pleading of the appellants being construed to admit these facts, under the settled rule of construction of such pleading. *Bona fida* purchasers for a valuable consideration are protected both by law and equity, "unless it shall appear that such purchasers had previous notice of the fraud, rendering void the title of their grantor." The bill does not charge any such notice. See chapter XXXIX, General Laws of Colorado, entitled "Frauds and Perjuries," approved March 22, 1877, which is a revision and re-adoption of the act entitled "Frauds and Perjuries," chapter XXXVII, of the Revised Statutes of Colorado, of the year 1868, approved January 10, 1868, the latter revision being the re-adoption of an act entitled "An act concerning fraudulent conveyances and contracts relative to real and personal property," approved October 31, 1861. See acts of Colorado of 1861, p. 245, the section protecting innocent purchasers, as revised and originally enacted, reading as follows:

"Sec. 21. The provisions of this act shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, *or of the fraud rendering void the title of such grantor*." This has been law in Colorado from 1861 to the date hereof.

Independent of any statute, Courts of equity are careful to protect *bona fide* purchasers.

2 Story's Equity, Secs. 1502, 1503, 1503 *a*.

The bill of the appellants shows that Whitsitt has neither any legal or equitable title to the lots described in the bill, and nothing whatsoever to stand upon in this Court. His counsel, in their brief, on page ten thereof, under the clause V of the same, use this language:

"2.—The plaintiffs, (*i. e.* Whitsitt and his tenant, Meskow), are entitled to relief, if at all, *solely* by reason of their first actual occupancy, or by reason of the conveyance of the Probate Judge of April 17, 1878."

We have shown the shadowy nature of this claim sufficiently to dispense with its further consideration. If the title to the lots mentioned was obtained by fraud of Chase, under the decisions adverted to above, the inhabitants of the city of Denver, as a community, alone can complain, and not the appellants.

Were a bill filed by such community, we would dispose of it promptly, under the general doctrine of equity adopted by this Court in regard to *laches* in the assertion of title, as well as the doctrine of estoppel, aided by the statute of limitations of this State.

Ang. on Limitations, Sect. 190, 187.
Badger vs. Badger, 2 Wallace, 95.
Wood vs. Carpenter, 101 U. S., 135.

Now, if that community is silenced, what business have the appellants in this or any other court as complainants against the appellees?

II.

But we propose now to discuss the third and fourth points of demurrer assigned in the Court below, and to show that this Court has not jurisdiction of this cause.

Firstly—The act of May 28th, 1864 (13 Stat., 94), "for the relief of the citizens of Denver," etc., Sec. 2, provides "That in all respects, except as hereinbefore modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of twenty-third of May, 1844, and the rules and regulations of the Commissioner of the General Land office."

The act of May 23, 1844, after creating the trust therein, provides in substance that the execution of the trust, as to the disposal of the lots in the town, and the proceeds of the sales thereof, shall be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same are situated.

We hold that the act of Congress, having referred the disposition of the lots in the city of Denver to the Legislature of Colorado, and it having acted, the rights of claimants to lots must be determined by a construction of the statute of that State upon the subject.

Romie vs. Casanova, 91 U. S. R., 380.
Trafton vs. Nougues, 4 Sawyer, 178.
Hoadly vs. San Francisco, 94 U. S. R., 4.

There is here no ground for contest as to the construction of the act of Congress of May 28, 1864, above mentioned. That act declares in words too plain for debate who the beneficiaries under it are; *there is no room for construction.* But if there is or was any doubt, the question is firmly settled by the opinion of this Court in the case of Cofield vs. McClellan, 16 Wall., *supra.*

The allegation in the bill of the plaintiffs, intended to show why the Court below should have jurisdiction of the cause, is defective and insufficient, in that it does not state "the precise points out of which it is supposed the jurisdictional question will arise, and how it will arise, so that the Court can determine for itself whether the case is a proper

one for consideration in the federal courts." The State Courts of Colorado can administer relief properly, if any is due in any quarter, in the premises, if a fraudulent entry of the lots was made by any person under the statute of that State regulating the disposal of the lots.

Secondly—Persons cannot idly invoke the jurisdiction of the Courts of the United States. It must appear, by the pleadings in any given case, where that jurisdiction is sought to interpret a statute of the United States, "*that the decision of the case depends upon that construction.*"

Gold Washing Co. vs. Keyes, 96 U. S., p. 203.

It is clear that no construction that may be given to the act of Congress of May 28, 1864 (*supra*), in regard to who shall be regarded as beneficiaries under it, can help the appellants in this cause, for the defendant, the Union Depot and Railroad Company, is shown by the bill to be the *bona fide* purchaser of the lots mentioned therein, for a valuable consideration, under a title granted by the Probate Judge and trustee, about twelve years prior to the time the appellants, as trespassers, "jumped" the property in controversy.

We have thus disposed of the claim of the appellants to the lots described in the bill, a claim which we have shown exists in the vivid imagination of the appellants alone, has no sanction in law or equity, and finds no support save in the fertile invention of able counsellors.

BELA M. HUGHES,
Solicitor for Defendants.

IN THE

SUPREME COURT,

OF OCTOBER TERM, A. D. 1880.

RICHARD E. WHITSITT and JAMES MESKOW

VERSUS

THE UNION DEPOT & RAILROAD CO. et als.

BRIEF IN REPLY.

IN THE SUPREME COURT,
OF OCTOBER TERM, A. D. 1880.

RICHARD E. WHITSITT and
JAMES MESKOW,

versus

THE UNION DEPOT & RAIL-
ROAD COMPANY *et als.*

BRIEF IN REPLY.

In every one of the cases cited by the learned counsel for appellee to sustain the proposition that "the Supreme Court of Colorado has constantly held that the trust in the probate judge, was for the benefit of the occupants of lots and the owners of the improvements thereon, at the date of the entry;" there was an actual occupancy and bona fide improvement at the date of the entry.

Thus in *Cook vs. Rice*, it is said in the opinion of the court "The evidence clearly establishes * * that one John Dalton entered upon this land in 1860, erected a

house or cabin, and occupied it with his family until 1863, he then conveyed it to Isaac N. Campbell, who entered into occupation and resided with his family until April, 1865.

Campbell placed some additional improvement on the property, and on the 7th day of June, 1866, conveyed these lots to Rice, who it appears has been in possession ever since." * * * There is nothing in the record to show that the complainant ever was in the occupation of the property, or ever placed any improvements thereon. (2 Col. 135.)

In *Clayton vs. Spencer*, it is declared as the conclusion of the court that "The evidence shows that Mary McLaughlin, through whom the appellee claims title, was in the actual occupancy of this property prior to and at the date of the entry, and that her possession continued until March, 1867. * * * It does not appear that Clayton or his grantors were ever in the actual occupancy of these lots." (2 Col. 380.)

In *Adams vs. Binkley* the court say: "The town site of Rosita was entered March 22, 1876. The evidence shows that on the 16th of October, 1875, the premises were unimproved and unoccupied. That at or about that date Adams entered upon and took actual possession of the same, erected a house and occupied the same continuously from November 20, 1875, until May 1, 1877. * * * Binkley's claim is based on a deed from Bradbury * * * Bradbury does not appear to have ever occupied or improved the premises, nor does Binkley after his purchase from Bradley.

(4 col. 248.)

It is manifest therefore that these cases to which the learned counsel refer with such a display of confidence, have no bearing at all upon the true resolution of the question here presented.

In each of these cases there was clear proof of an actual occupancy, and *bona fide* improvement at the date of the entry in the successful party.

In this case the defendant, by the confession of his demurrer, never had either. The possession lay vacant until the plaintiffs entry in 1879.

Our contention that as to the lots vacant at the date of the entry the trust remained in abeyance until by a subsequent actual occupancy the beneficiary should be appointed, has never been made, except in *The City v. Kent*, before cited.

It is true that in *Cofield v. McClellan* (16 Wall 333) Mr. Justice Hunt says that "Those in possession of the lands when the entry shall be made by the probate judge are the persons for whom he holds the lands in trust, and to whom he is to make the respective deeds."

But in that case, as in the other cases, the evidence was found to be "strong and quite convincing" that at the date of the entry the defendant was in the actual possession * * with valuable improvements made therein."

As appears by the reporter's statement of the case, the plaintiff claimed "a prior settlement by one Preston in 1859, a conveyance by Preston to Hall, several intermediate conveyances by which the lot came to Bates, a conveyance by

Bates to the complainant." But there was no pretence that the plaintiff had ever presented the statement of his claim to the probate judge as required by the territorial legislature.

The question was therefore two-fold, to wit: 1st, Was the plaintiff the first occupant? 2nd, What was the effect of his failure to present the statement of his claim to the probate judge, within the time limited by statute.

It is manifest that the resolution of these questions does not involve those presented in the present case.

The remarks of Mr. Justice Hunt were therefore mere *dicta*, and in the language of Marshall C. J. in Cohen v. Virginia "ought not to control the judgment in another suit, when the very point is presented for decision." (6 Wh. 399.)

The rule of property for which our adversaries contend, depends therefore on the decision of one State Court; the decision of one territorial court divided; and the dictum of one justice of this court.

Upon what principle shall these errors of the Courts of Michigan and Colorado control the interpretation of federal statutes for other States and Territories?

II.

As to the title derived under the deed of the Probate Judge of April 17, 1878.

The learned counsel cite Cook v. Rice to the proposi

tion that by the previous conveyance to Chase, the power of the probate judge was exhausted.

Upon this we observe:

1. That in Cook v. Rice the prior deed was lawfully made to an actual occupant, while here the first conveyance being to one who never had either occupancy or improvement, was by the letter of the act of Congress "void and of none effect."

2. The decision in Cook v. Rice was expressly put upon the ground that the Revised Statutes of the Territory, controlling the transactions then in question, "limit the jurisdiction of the probate judge to such lands as shall be held by him."

But subsequent to that conveyance the act of 1872 expressly conferred on the probate judge authority to execute the deed of April 17, 1878, [See Sec. 9 of the Statutes as printed at the end of the former brief].

Our learned friend asserts that the Depot and Railroad Company was in actual possession when (to use his own phraseology) "plaintiff jumped said lots, by a fence about the same."

This is an inadvertence—

The distinct averment of the bill is that "until the assumption of possession thereof by the plaintiffs * * the said premises and every part thereof were entirely vacant, (t. p. 2) though there is an averment (t. p. 6), which

doubtless misled counsel, that "the defendants will claim that at some time long since the entry of the said town site they or some of them * * erected upon and around the said lots a certain fence."

Upon the question as to which had the prior posession, as well as upon the question of fact involved in the plea of bona fide purchase which counsel have injected into the belly of this demurrer, we shall meet our adversaries with confidence at the proper time.

Wells Smith & Macon
Jones & Reed
Solrs for appellants